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No. _____

In The

Supreme Court of the United States

October Term, 1996

THE STATE OF ARIZONA, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Arizona may seek declaratory or equitable relief against federal officials for failing to fulfill their constitutional duty to protect Arizona from the massive influx of illegal immigrants, when this failure forces the State to spend millions of dollars every year to incarcerate the illegal immigrants who commit felonies in Arizona.

2. Whether the State of Arizona may seek a declaration that the Attorney General has the discretion to fulfill the congressional mandate to reimburse Arizona for the costs that it has been forced to incur to imprison illegal aliens from appropriations related to the enforcement of immigration laws and funds that the federal government collects from immigration-related fines and penalties.

3. Whether the State of Arizona may seek declaratory or equitable relief against federal officials for violating the Tenth Amendment by commandeering Arizona's sovereignty to discharge by default the federal government's plenary responsibility to control illegal immigration.

PARTIES TO THE PROCEEDING BELOW

Petitioners are the State of Arizona; Arizona's Governor, J. Fife Symington, III; Eugene Moore, the Director of the Arizona Department of Juvenile Corrections (formerly the Arizona Department of Youth Rehabilitation); and Terry Stewart, the Director of the Arizona Department of Corrections (formerly Samuel A. Lewis).

The Respondents are the United States of America; United States Attorney General Janet Reno; Doris Meissner, Commissioner of the Immigration and Naturalization Service; and Alice Rivlin, the Acting Director of the United States Office of Management and Budget (substituted by the Ninth Circuit Court of Appeals for Leon Panetta).

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeal's order affirming dismissal of Arizona's Amended Complaint is reported at 104 F.3d 1095 and is set forth in Appendix ("App.") A. The order consists of one sentence, in which the court states that it affirms on the basis of a companion decision in *California v. United States*, No. 95-55490, which is reported at 104 F.3d 1086 and set forth at App. B. The judgment of the United States District Court for the District of Arizona is not reported. App. C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its decision on January 7, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are Article IV, Section 4, United States Constitution; the Tenth Amendment, United States Constitution; 5 U.S.C. § 702; 8 U.S.C. § 1330; 8 U.S.C. § 1365; 28 U.S.C. § 2201; Pub. L. No. 103-121, 107 Stat. 1153, 1160 (1993); Pub. L.

No. 103-317, 108 Stat. 1725, 1778 (1994); Pub. L. No. 103-322, 108 Stat. 1796, 1823-24 (1994). Relevant excerpts of these provisions are set forth in App. D.

STATEMENT OF THE CASE

In a nation in which the Constitution is the supreme law of the land, no one – not even the federal government – should be allowed to violate the Constitution with impunity. Yet that is what the lower courts' decisions have permitted here: the federal government's failure to honor the Constitution's express guarantee to protect Arizona's borders has forced Arizona to incur millions of dollars in avoidable costs to incarcerate illegal aliens. Moreover, the federal executive branch has ignored Congress' mandate to reimburse Arizona for these costs, thus upsetting the proper balance of power within the federal government itself. And Arizona is being told that the federal courts will do nothing about it.

This case raises questions concerning the proper allocation of power, both among the coordinate branches of the federal government, and between the federal government and the States. Initially at issue is whether the federal government has the power to abdicate its constitutional responsibility to protect the States' borders and to instead shift the political accountability and financial costs of this abdication to the States. Also raised is the power of executive branch officials to ignore Congress' mandate that the States be reimbursed for the expenses that the federal government's abdication forces them to incur. Ultimately, this case concerns the power of the

States to obtain relief from the abdication by invoking the judiciary's declaratory and equitable power.

If allowed to stand without comment by this Court, the Ninth Circuit's decision will exacerbate the rewriting, and narrowing, of this Court's evolving federalism jurisprudence which has determined not to shy away from politically controversial disputes if a state's definable rights in the federal system are at stake. *See New York v. United States*, 505 U.S. 144 (1992). This Court should take this opportunity to correct the lower courts' erroneous application of its decisions.

A. General Background

1. By Failing to Fulfill Their Duty to Enforce Immigration Laws, Respondents Have Forced Arizona to Spend Millions of Dollars Annually to Imprison Illegal Aliens.

When Arizona joined the Union, it surrendered to the federal government its right to protect its borders against unlawful, mass migrations. In exchange, the federal government promised to protect Arizona from invasion. (Amended Complaint "Compl." at ¶ 24.)[1] Arizona must rely solely on the federal government to protect the State's borders against illegal immigration. (*Id.* at ¶ 2.) *See Passenger Cases*, 48 U.S. (7 How.) 283, 391 (1849) (States cannot take immigration into their own hands).

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[1] All factual statements made herein are based upon allegations made in Arizona's Amended Complaint, which this Court must take as true. *Zinermon v. Burch*, 494 U.S. 113, 118 (1990).

The federal government, however, has failed to provide the promised protection. (Compl. at ¶ 3.) Arizona continues to be subjected to a massive incursion of illegal aliens.[2] (*Id.*) Members of Congress have characterized the sheer size and impact of this unauthorized migration as an "invasion." *See, e.g.*, 132 Cong. Rec. 3466 (1986) (Remarks of Rep. Lowery). (Compl. at ¶ 26.)

This invasion of illegal aliens costs Arizona taxpayers millions of dollars each fiscal year. For example, Arizona must bear the cost of incarcerating aliens who enter Arizona illegally and then commit criminal offenses. (*Id.* at ¶ 4.) As of December 31, 1993, the Arizona Department of Corrections ("ADOC") housed a prison population of 17,968. (*Id.* at ¶ 37.) Both ADOC and the United States Immigration and Naturalization Service ("USINS") estimated that approximately ten percent of these inmates were subject to deportation as "illegal aliens" as that term is used in 8 U.S.C. § 1365(a). (*Id.*) Arizona must spend approximately $15,773 per year to incarcerate an inmate in an ADOC prison. (*Id.* at ¶ 38.) During Arizona's fiscal year 1992-1993, Arizona spent approximately $25 million to incarcerate illegal aliens convicted of Arizona felonies. (*Id.* at ¶ 39.) During the State's fiscal year 1993-1994, it spent approximately $30 million for the same purpose. (*Id.*) Arizona spends additional funds for parole supervision of undocumented aliens that USINS does not deport.

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[2] The Amended Complaint defines the term "undocumented" or "illegal" alien to include aliens who are not entitled to lawfully immigrate to the United States, who have unlawfully entered, and who unlawfully remain within the State. (*Id.* at ¶ 25.)

(*Id.* at ¶ 41.) Arizona also has incurred long-term financial obligations of approximately $66 million to build the equivalent of two prisons necessary to house over 1,760 illegal alien felons. (*Id.* at ¶ 40.)

Arizona also appropriates and spends funds to incarcerate illegal alien youths who have been convicted of a felony, as that term is used in the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3342, 3359 (1986) ("IRCA"). (Compl. at ¶ 43.) The cost of housing a juvenile for one year is approximately $41,610. (*Id.*)

2. Respondents Have Failed to Obey the Congressional Mandate to Reimburse Arizona for the Costs of Incarcerating Illegal Aliens.

In 1986, Congress enacted the IRCA, which directs that "[s]ubject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for costs incurred by the State for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such State." 8 U.S.C. § 1365(a). Congress also authorized the appropriation of all sums necessary to reimburse the States for such costs. (Compl. at ¶ 43.)

In 1993, Congress appropriated over $1 billion to the Attorney General of the United States for expenses necessary to administer and enforce laws relating to immigration, naturalization, and alien registration during the federal fiscal year ending September 30, 1994. Pub. L. No. 103-121, 107 Stat. 1153, 1160 (1993). Arizona contends that this appropriation authorized the Attorney General to

expend funds to reimburse it for the costs that the IRCA described. (Compl. at ¶ 49.)

In 1990, Congress amended the Immigration and Nationality Act to increase various civil fines and forfeitures for the immigration law violations that 8 U.S.C. § 1330(b) enumerated. Pub. L. No. 101-649, 104 Stat. 5057 (1990). (Compl. at ¶ 50.) The amendment authorized the Attorney General to use any collected increased penalties as a continuing appropriation to support activities that would enhance the enforcement of the immigration laws, including the identification, investigation, and apprehension of criminal aliens. (*Id.*) Arizona contends that the Attorney General could use this fund to comply with 8 U.S.C. § 1365's mandate that it be reimbursed the cost of incarcerating illegal aliens.

On August 26, 1994, Congress enacted a measure that purported to implement 8 U.S.C. § 1365 by appropriating $130,000,000 to the Attorney General to reimburse the States for the cost of incarcerating illegal alien felons beginning October 1, 1994. Pub. L. No. 103-317, 108 Stat. 1725, 1778 (1994). The measure's implementing regulations established a formula for disbursement. (Compl. at ¶ 50.) The measure required the Attorney General to distribute one-third of the appropriated amount not later than 120 days after the start of the federal fiscal year. (*Id.*) It further required that qualified States apply for the remaining amounts prior to September 30, 1995, and that

no State receive a distribution until its State plan had been approved. (*Id.*)[3]

On September 16, 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). (Compl. at ¶ 52.) The Act authorized the Attorney General to make "contractual arrangements" to compensate individual States for the cost of incarcerating undocumented criminal aliens upon submission of an application that meets certain conditions and priorities. The Act limits reimbursement to formulas that do not provide reimbursement in full. *See id.*, 108 Stat. at 1823-24. (Compl. at ¶ 53.)[4] As of the date that Arizona filed its Amended Complaint, Congress had not enacted a specific appropriation other than the one found in Public Law 103-317 to reimburse Arizona under 8 U.S.C. § 1365. The Attorney General has construed federal law as requiring that a *specific* appropriation be enacted before she can implement that statute.

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[3] The appropriation did not provide for full federal reimbursement of Arizona's cost of incarcerating illegal felons, and it did not fully implement 8 U.S.C. § 1365's provisions. (*Id.*) However, it did authorize disbursements from which Arizona received partial reimbursement.

[4] While the 1994 Crime Act authorizes reimbursement to the States through the year 2000, the Act does not require the Attorney General to fully reimburse Arizona for its costs of incarcerating illegal aliens, or to provide any reimbursement whatsoever. Section 20301 authorizes (1) $130,000,000 for fiscal year 1995; (2) $300,000,000 for fiscal year 1996; (3) $330,000,000 for fiscal year 1997; (4) $350,000,000 for fiscal year 1998; (5) $350,000,000 for fiscal year 1999; (6) $340,000,000 for fiscal year 2000. 108 Stat. at 1824. (Compl. at ¶ 54.)

(Compl. at ¶ 55.) Since Arizona filed its Amended Complaint in 1994, it has received some federal funds for reimbursement of the costs of incarcerating illegal aliens, but not nearly enough to cover its true costs.

3. By Failing to Enforce Immigration Laws and to Implement Congressionally Mandated Reimbursement Directives, Respondents Have Essentially Commandeered Arizona's Sovereign Functions.

As a direct result of Respondents' failure to properly administer federal immigration law, Arizona must cope with staggering numbers of illegal aliens (*id.* at ¶ 62), and Arizona must divert tax funds that it would otherwise have available for different purposes to cover the cost of convicting and incarcerating the illegal aliens who commit crimes within its borders.[5] (*Id.* at ¶¶ 44, 45.)

Respondents have therefore prevented Arizona from exercising its sovereign authority to spend its tax funds as it sees fit. By requiring it to enact, administer, and interpret state laws as surrogates for the unenforced federal laws, Respondents have essentially "commandeered" the State's Legislative, Executive, and Judicial Branches. (*Id.* at ¶¶ 30, 45, 63.) This violates Arizona's sovereignty and its constitutional rights. (*Id.*)

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[5] Of course, the costs imposed on Arizona go far beyond corrections issues (*e.g.*, costs related to health care), but the Amended Complaint focuses on the concrete and undeniable corrections-related costs.

Further, by failing to reimburse Arizona as 8 U.S.C. § 1365 requires, Respondents have camouflaged the monetary impact of their failed immigration programs from the voters who elected them to develop and administer such programs effectively. (Compl. at ¶ 65.) Respondents should not be permitted to evade political accountability by forcing the States as separate sovereigns to bear the costs of a systemic failure that they did not engineer and that they cannot repair.

The Attorney General has ignored Arizona's demands that it be fully reimbursed for the cost of incarcerating illegal alien felons. Arizona therefore has no recourse but to seek judicial relief from the federal government's failure to comply with and enforce its immigration laws. (*Id.* at ¶ 68.)

B. Proceedings Below.

1. Petitioners' Amended Complaint Seeks Only Declaratory and Equitable Relief.

a. Count One – Violation of Article IV, Section 4 of the United States Constitution.

Petitioners filed their Amended Complaint on May 2, 1994, alleging that Respondents failed to protect Arizona from invasion and denied Arizona a republican form of government. (*Id.* at ¶¶ 23-35.) The Amended Complaint sought a declaration that Respondents had failed to perform their duties under Article IV, Section 4 of the United States Constitution. (*Id.* at p. 24.) The Amended Complaint also asked the district court to exercise its equitable jurisdiction to remedy Respondents' failure by requiring

Respondents to reimburse Arizona the incarceration costs attributable to illegal aliens now currently residing within the State. (*Id.* at ¶ 35.)

b. Count Two – Failure to Reimburse Arizona from Existing Appropriations.

The Amended Complaint alleges that 8 U.S.C. § 1365 entitles Arizona to reimbursement for the costs it incurs to imprison illegal alien felons. It contends that the Attorney General could properly take reimbursement funds from the following sources: (i) Public Law 103-121's lump-sum appropriation to the Department of Justice for the fiscal year ending September 30, 1994; (ii) any additional fine or forfeiture funds that 8 U.S.C. § 1330 authorizes Attorney General Reno, Commissioner Meissner, or Director Rivlin to expend; and (iii) any similar appropriation to the Attorney General for subsequent fiscal years, such as Public Law 103-317, 108 Stat. at 1778, enacted for the federal fiscal year commencing on October 1, 1994. (Compl. at ¶ 56.)

The Attorney General, however, has taken the position that Public Law 103-121's appropriation, the additional funds that 8 U.S.C. § 1330 makes available, and similar appropriations, are not available to reimburse Arizona under 8 U.S.C. § 1365. (*Id.* at ¶ 57.) Thus, the Amended Complaint seeks a declaration that appropriate reimbursement sources exist. (*Id.* at ¶ 59.)

c. Count Three – Tenth Amendment Violation.

The Amended Complaint alleges that Respondents' failure to properly exercise the federal government's plenary power to enforce federal immigration laws has forced Arizona to enact State laws and to expend State tax dollars to implement federal immigration policy in violation of the Tenth Amendment. (*Id.* at ¶¶ 61-70.) Arizona seeks equitable relief asking that Respondents be required to reimburse it for the costs incurred in implementing federal immigration policy during Arizona fiscal years 1991-92 through 1994-95, and for subsequent years during which the federal government continues to violate the Constitution. (*Id.* at ¶ 70.)

2. The Lower Courts' Decisions.

The district court dismissed Arizona's Amended Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). App. C. The Ninth Circuit summarily affirmed, App. A, on the basis set forth in a companion case involving the State of California. App. B. Both the district court and the Ninth Circuit rejected the State's Invasion Clause claim, holding that "mass migrations" are not the type of invasions that the Clause encompassed. App. 10-11, 28. Both courts also held that Congress has plenary authority over the admission of aliens and that the political nature of the controversy and the absence of judicially manageable standards prevented judicial review. App. 9-10, 28-29.

With respect to the State's claim for reimbursement under 8 U.S.C. § 1365, the district court held that lump-sum allocations are committed to agency discretion and are therefore non-reviewable, and that any claim seeking monetary reimbursement was barred by sovereign immunity. App. 33-34. The court also characterized Arizona's request for a declaration of rights as to the Attorney General's discretion to allocate funds appropriated under Public Law 103-121 and 8 U.S.C. § 1330 as a request for an advisory opinion. App. 35. The Ninth Circuit agreed on all points. App. 16-18.

Finally, the district court rejected the State's Tenth Amendment claim finding that the costs Arizona incurred to incarcerate illegal aliens did not result "from federal law but from Arizona's own decision to prosecute illegal aliens for criminal offenses defined by Arizona law," and added that "[t]he Government did not command Arizona to enact and enforce a criminal code." App. 31-32. The Ninth Circuit concurred, but added that the State's Tenth Amendment claims raised non-justiciable political questions. App. 15, 16.

REASONS TO GRANT THE PETITION

THIS COURT SHOULD ACCEPT THIS PETITION TO DECIDE IMPORTANT AND NOVEL QUESTIONS OF FEDERAL LAW AND TO CORRECT THE LOWER COURTS' MISINTERPRETATION OF THIS COURT'S PRIOR DECISIONS.

A. Arizona Is Entitled to a Declaration as to the Availability of Certain Funds to Fulfill the Congressional Mandate to Reimburse the State for the Costs That it Incurs to Imprison Illegal Aliens.

This case presents a classic test of both federalism and separation of powers between the federal branches of government. The federal government undeniably has the plenary duty to protect this country's borders. In recognition of this cornerstone to our federal system, Congress has told the executive branch that it "***shall reimburse*** a State for the costs incurred by the State for the imprisonment of any illegal alien. . . . " 8 U.S.C. § 1365(a) (emphasis added). Petitioners' Amended Complaint, in part, merely seeks a declaration that reimbursement of the State's expenditures to incarcerate illegal aliens is available from appropriations already made to the Attorney General.

Arizona understands that reimbursement for its expenses to incarcerate illegal alien felons depends upon Congress. However, all Arizona seeks is a declaration that Congress made such an appropriation when, for example, it passed Public Law 103-121, and provided over one billion dollars in a lump-sum amount for the Attorney General to use in enforcing immigration laws. Arizona also points to 8 U.S.C. § 1330, which provides

revenue to the USINS budget from fines and forfeitures for violations of immigration laws.

The underlying question is whether Section 1365's reference generally to "appropriation Acts"[6] is limited to acts that specifically earmark funds as reimbursement for incarceration costs, or whether it makes any relevant appropriation available to carry out Congress' obvious intent. The Attorney General has excluded reimbursement under 8 U.S.C. § 1365 from appropriations made under Public Law 103-121 and from similar annual appropriations, contending that she has no discretion to provide reimbursement from such funds. The Amended Complaint merely requests a judicial resolution of the narrow issue concerning the availability of these funds to fulfill the congressional mandate contained in 8 U.S.C. § 1365.

Thus, Petitioners' Amended Complaint does not seek to control the particulars of the Attorney General's exercise of discretion or ask the Court to order the immediate payment of funds from past lump-sum appropriations. Instead, it only seeks to establish that the Attorney General has discretion to consider using the lump-sum appropriations to fulfill the congressionally mandated duty to reimburse the States for incarceration costs from its "appropriation Acts." The Attorney General can then exercise discretion as to the amount to be allocated to the State of Arizona, pursuant to 8 U.S.C. § 1365, along with any other authorized purposes.

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[6] The 1994 Crime Bill (Public Law 103-322) and other subsequent laws provide for some, but not full, reimbursement of the costs to the States.

Seen in this light, the lower courts' sovereign immunity problem is nonexistent. This Court has permitted a plaintiff to sue a federal agency under 5 U.S.C. § 702 when the plaintiff has a specific claim to existing property or money rather than a claim for general monetary damages. *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). Petitioners here have a specific claim under 8 U.S.C. § 1365 and merely seek a declaration of rights under that law.

With respect to the issue of agency discretion, the lower courts incorrectly read this Court's decision in *Lincoln v. Vigil*, 508 U.S. 182 (1993), which involved a decision by the executive branch to terminate a program for Indian children. In that case, the Director of the Indian Health Service actually exercised her discretion in deciding to terminate the Program, *id.* at 188, and this Court held that the decision was not reviewable because agencies have discretion to spend lump-sum appropriations without judicial interference, as long as their expenditures meet permissible statutory objectives. *Id.* at 193-94.

Reimbursing the States for the costs that they incur to incarcerate illegal aliens is clearly a permissible statutory objective. *See* 8 U.S.C. § 1365. Respondent Reno nevertheless believes that she lacks discretion to consider reimbursing Arizona for its costs to incarcerate illegal aliens from either lump-sum appropriations or Section 1330 funds. Petitioners should at least be allowed to seek a declaration that Respondent Reno has this discretion.

Finally, a judicial resolution of this controversy will not be merely advisory, but will affect the rights of the

parties. It cannot be assumed that the Attorney General will ignore a ruling that makes lump-sum appropriations, and other similar funds, available to fulfill the reimbursement dictates of 8 U.S.C. § 1365. Arizona's rights in this matter will be altered profoundly by the declaration sought here, and the district court should not have dismissed the issue without even reaching the merits of Petitioners' claim.

B. Arizona Has a Justiciable Cause of Action for Equitable and Declaratory Relief Based on the Respondents' Failure to Protect the State from Invasion and Their Commandeering of Arizona's Resources.

1. The Constitution Requires the Federal Government to Protect Arizona's Borders From Invasion by Illegal Aliens.

Article IV, Section 4 of the Constitution provides that the United States "shall protect each of [the States] against Invasion." The Constitution's mandate that the United States "shall" protect the States against invasion is so important that it marks the only instance in which the Constitution establishes a duty upon the "United States" in its corporate name. *See* Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513, 523 (1962). Yet Respondents have failed to satisfy this obligation, as proven by the ever-increasing multitudes of aliens that cross Arizona's borders illegally.

The lower courts dismissed this theory, in part, on the ground that the protection that the Invasion Clause

affords does not encompass defending Arizona's borders from the massive influx of illegal immigrants, but instead protects Arizona against military incursions. This narrow view of the Invasion Clause turns a blind eye upon the realities of both past and current immigration problems and pays little regard to this Court's prior invocations of the Invasion Clause's power to remedy this nation's immigration dilemmas.

The United States has periodically faced massive immigration emergencies such as the one that Arizona faces today. In those circumstances, this Court has read the word "Invasion" much more broadly than the lower courts read it here. In *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889), this Court based its determination that Congress had authority to enact legislation expelling Chinese laborers upon the United States' constitutional power to protect States against invasion under the Invasion Clause:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, ***whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.***

Id. at 606 (emphasis added). The Court went on to note that if

> the government of the United States, through its legislative department, considers the presence of [certain] foreigners . . . to be dangerous to its

> peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

Id.; *See also Fong Yue Ting v. United States*, 149 U.S. 698, 706 (1893); *In re Impaneling & Instructing the Grand Jury*, 26 F. 749, 751 (D. Ore. 1886) ("the United States has the same right to prevent an immigration within its boundaries, of people that it deems objectionable, as it would have to repel an armed invasion by them").

Arizona spends millions of dollars annually to incarcerate those who are illegally present within its borders. Even Congress admits that such persons are properly the United States' responsibility. By any measure, Respondents have failed to comply with the constitutional mandate that the federal government shall protect the States against invasion. The cost that the current invasion inflicts upon Arizona is no less real because no declarations of hostilities exist between the United States and the native countries of those who come here illegally. Therefore, this Court should correct the lower courts' narrow interpretation of the Invasion Clause.

2. By Failing to Enforce Federal Immigration Laws, Respondents Have Commandeered Arizona's Political System in Violation of the Tenth Amendment.

Arizona's third claim for relief is based, in part, upon Respondents' violation of the Tenth Amendment, which provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the

States, are reserved to the States respectively, or to the people." There can be no dispute that the Constitution delegates the power to regulate immigration to the United States. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Boutilier v. Immigration and Naturalization Serv.*, 387 U.S. 118, 123-24 (1967). Indeed, this Court has affirmatively held that the States cannot take immigration matters into their own hands. *See, e.g., Passenger Cases*, 48 U.S. (7 How.) 283, 391 (1849). Arizona is therefore powerless to control the flow of immigrants into the State.

Yet the United States has failed to perform its constitutionally mandated function, thus impermissibly shifting the burden of implementing its immigration policy onto the State. Arizona is forced to bear the costs of incarcerating at least 1,700 illegal alien inmates who are eligible for deportation, even though it can control neither the immigration policy that allowed them into the country, nor the enforcement mechanisms that can require them to leave it.

In *New York v. United States*, 505 U.S. 144 (1992), this Court held that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program," (*id.* at 188), and accordingly struck down a federal statute that "commandeered" the State's legislative process to federal ends. (*Id.* at 176). In doing so, the Court emphasized that:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational

> chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," . . . reserved explicitly to the States by the Tenth Amendment.

Id. at 188 (quoting *The Federalist* No. 39, p. 245 (C. Rossiter ed. 1961)). However, by allowing thousands of illegal aliens to cross into Arizona, the federal government has turned Arizona into nothing more than a southern regional office of the USINS that must, at no economic or political cost to the federal government, retain thousands of illegal inmates in its criminal justice system. Although no express congressional mandate such as the one at issue in *New York* exists here, the practical effect on Arizona's sovereignty is the same. Indeed, the violation of Arizona's sovereignty is arguably more insidious here because it does not result from an expression of congressional intent, but from the failure of federal officials to obey the Constitution and federal immigration law.

The lower courts' conclusion that Arizona could avoid its predicament if it simply stopped enforcing its criminal laws against illegal aliens is ludicrous. It ignores the State's fundamental obligation to provide for the safety and welfare of its citizens, primarily by enforcing its criminal laws. Although the federal government may have the luxury of abdicating its constitutional duty to protect Arizona's borders, Arizona cannot solve the problems that this abdication causes by following the federal government's example and abdicating its duty to prosecute and incarcerate illegal aliens who commit felonies within Arizona's unprotected borders.

Indeed, this conclusion highlights the similarity between Arizona's precarious situation and the one

addressed in *New York*. Even if Arizona were to take the irresponsible step of granting criminal immunity to illegal aliens, it could only do this through its Legislature's enactment of a law to this effect. As New York state did in *New York*, Arizona has two choices here, and either choice requires Arizona's elected officials to take an action based solely upon the federal government's failure to enforce federal immigration law.

Arizona is forced to decide every year whether to enact laws expending resources to accommodate illegal immigrants who are – under the Constitution – the Respondents' responsibility, or to enact laws that exempt illegal aliens from criminal responsibility. Either way, Arizona must enact laws. This is the heart of the Tenth Amendment violation that this Court should remedy.

There is no constitutionally meaningful difference between the overt mandates struck down in *New York* and the covert mandates at issue here. In either case, Arizona is left with no choice but to pay with its sovereignty. Under *New York*, this non-choice is unacceptable.

3. Arizona's Invasion Clause and Tenth Amendment Claims Are Justiciable.

The lower courts held that Arizona's Invasion Clause claim and Tenth Amendment claim are not justiciable, but are instead political questions that the judiciary cannot address. The modern trend, however, is not to dismiss a matter merely because it is intertwined with difficult political issues. To the contrary, this Court has recently demonstrated the ability to resolve disputes that many had labeled too "political." *See Davis v. Bandemer*, 478 U.S.

109, 121-22 (1986) (claim of gerrymandering is not a political question); *Baker v. Carr*, 369 U.S. 186, 208-17 (1962) (challenge to apportionment statutes held justiciable).

Thus, not every matter that touches on important policy issues falls under the political question doctrine. (*Id.* at 211). The proper question is not whether a case is "political," but whether the case seeks to resolve a "political question." (*Id.* at 217). In *Baker*, the Court identified several types of cases that would involve unreviewable political questions, including (but not limited to) issues that are constitutionally committed to a coordinate branch of government, issues with no judicially discoverable or manageable standards for resolution, and issues that are impossible to decide without making policy choices. (*Id.* at 217). The Court summarized the relevant portion of the political question doctrine in *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986), as follows:

> The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. . . . As *Baker* plainly held, however, the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and acceptable task for the federal courts.

Id. at 229-30.

Here, the constitutional questions presented do not require policy determinations confined solely to Congress or the executive branch. Instead, Arizona merely asks the

federal courts to interpret the Constitution and acts of Congress – a task for which the federal courts exist. This Court should not deny Arizona a remedy for its grievances against the federal government, even if the underlying issues are hot political topics that officials at all levels of federal and state government debate in the public forums.

* * *

In *United States v. Nixon*, 418 U.S. 683 (1974), this Court upheld the principle that no person – not even the President – is above the law. Here, Petitioners ask this Court to affirm again that officials of the federal government are not above the Constitution, or beyond the reach of redress. The independent federal judiciary should not turn its head and allow the federal government to shirk its responsibility to protect the physical integrity of sovereign States with foreign borders. On these vital issues, Arizona should get its day in Court.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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April 7, 1997

APPENDICES

APPENDIX A

STATE of ARIZONA; J. Fife Symington, III, Governor; Eugene R. Moore, Director of Arizona Department of Youth Rehabilitation; Samuel A. Lewis, Director, Arizona Department of Corrections, Plaintiffs-Appellants,

v.

UNITED STATES of America; Janet Reno, Attorney General; Doris Meissner, Commissioner, Immigration and Naturalization Service; Alice Rivlin, Acting Director of Office of Management and Budget, Defendants-Appellees.

No. 95-15980.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 12, 1996.
Decided Jan. 7, 1997.

Thomas J. Dennis, Assistant Attorney General, James R. Morrow, Assistant Attorney General, Phoenix, AZ, for plaintiffs-appellants.

Mark B. Stern, Ellen D. Katz, United States Department of Justice, Washington, DC, for defendants-appellees.

Appeal from the United States District Court for the District of Arizona, Stephen M. McNamee, District Judge, Presiding. D.C. No. CV 94-866 SMM.

Before: REINHARDT and HALL, Circuit Judges, and MERHIGE, Senior District Judge.*

MERHIGE, Senior District Judge.

For the reasons set forth in *California v. United States*, No. 95-55490, 104 F.3d 1086 (9 Cir.1997) decided this day, the judgment of the district court is AFFIRMED.

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*The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX B

STATE OF CALIFORNIA, Pete Wilson, Governor; Joe G. Sandoval, Secretary, Youth and Adult Correctional Agency; James H. Gomez, Director, Department of Corrections; Francisco J. Alarcon, Chief Deputy Director, Department of the Youth Authority; Russell S. Gould, Director of Finance, State of California; Sandra Smoley, Secretary, Health and Welfare Agency, State of California; S. Kimberly Belshe, Director of Health Services, State of California, Plaintiffs-Appellants,

v.

UNITED STATES of America; Janet Reno, Attorney General; Doris Meissner, Commissioner, Immigration and Naturalization Service, United States; Alice Rivlin,* Acting Director, Director, U.S. Office of Management and Budget, United States, Defendants-Appellees.

No. 95-55490.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 12, 1996.

Filed Jan. 7, 1997.

Floyd D. Shimomura, Assistant Attorney General, Linda A. Cabatic, Supervising Deputy Attorney General, Paul H. Dobson, Deputy Attorney General, Sacramento, California, for the plaintiffs-appellants.

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*Substituted for Leon Panetta, Director of Office Management and Budget.

Mark B. Stern, United States Department of Justice, Washington, D.C., for the defendants-appellees.

Louis F. Hubener, Assistant Attorney General, Office of the Attorney General, Tallahassee, Florida; Ian Fan, Deputy, San Diego, California; Daniel J. Popeo, David A. Price, Washington Legal Foundation, Washington, D.C., for the amici curiae.

Appeal from the United States District Court for the Southern District of California, Judith N. Keep, Chief Judge, Presiding. D.C. No. CV 94-0674-K.

Before REINHARDT and HALL, Circuit Judges, and MERHIGE, Senior District Judge.**

MERHIGE, Senior District Judge:

In this appeal, Plaintiffs-Appellants State of California[1] ("California") and state officials Governor Pete Wilson; Director of Finance, Russell S. Gould; Acting Secretary, Youth and Adult Correctional Agency, Joe G.

**The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

[1] Both the State of California and the State of Arizona have sought redress from what each contends are violations of constitutional and statutory rights. The claims of each of these states were consolidated for argument. The Court heard the *California* action first, at counsels' request, followed immediately by argument from the State of Arizona. Although both Complaints contain similar prayers for relief, California's Complaint asserts additional claims than that of the State of Arizona. Accordingly, we resolve the California case in this opinion, and dispose of the Arizona case on the same grounds in an Order filed concurrently herewith.

Sandoval; Director of the Department of Corrections, James H. Gomez; Chief Deputy Director of the Department of the Youth Authority, Francisco J. Alarcon; Acting Secretary, Health and Welfare Agency, Sandra R. Smoley; and Director of the Department of Health Services, S. Kimberly Belshe (collectively, "California" or "the State") appeal from a judgment entered in the United States District Court for the Southern District of California granting the motion of the Defendants-Appellees United States of America and federal officials Attorney General Janet Reno ("Attorney General"); Acting Director of the Office of Management and Budget, Alice Rivlin; Commissioner, Immigration and Naturalization Service, Doris Meissner ("Commissioner of the INS"); Secretary of Health and Human Services, Donna E. Shalala; Administrator, Health Care Financing Administration, Bruce C. Vladek; and Secretary of Education, Richard W. Riley to dismiss California's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[2]

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[2] A number of *amici curiae* have also filed briefs. Amongst these interested parties, all of whom support the Complaint filed by the Plaintiff-Appellants, are a number of United States and California legislators as well as The Washington Legal Foundation, The Allied Education Foundation and The California Correctional Peace Officers Association. The joint briefs of the aforementioned, for which the Court expresses its appreciation, have been considered in reaching the Court's conclusion.

It is also noted that the Amended Complaint added claims and two state public health officials as plaintiffs and the United States Secretary of Health and Human Services, the Administrator of the United States Health Care Financing Administration, and the United States Secretary of Education as defendants.

In its Complaint, California asserts various constitutional and statutory claims premised on the impact of federal immigration policy on the State, particularly as it affects the State's fiscal burdens. California seeks monetary damages as well as injunctive and declaratory relief under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Jurisdiction has been asserted pursuant to 28 U.S.C. §§ 1331, 1346, 1361, 2201 and 2202 against the United States and a number of its officials acting in their official capacities. The matter in controversy allegedly arises under the Constitution and laws of the United States. This Court has jurisdiction as well under 28 U.S.C. § 1291. The immediate issue before the Court is the correctness of the trial court's dismissal of the Amended Complaint under Fed.R.Civ.P. 12(b)(6) for the failure to state a claim upon which relief can be granted. For the reasons stated below, the judgment of the district court is affirmed.

I.

This Court reviews *de novo* a grant of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir.1995). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hughes v. Rowe*, 449 U.S. 5, 10, 101 S.Ct. 173, 176, 66 L.Ed.2d 163 (1980) (citation omitted). When reviewing a district court's dismissal of a complaint for failure to state a claim, this Court must accept the facts alleged in the complaint as true. *Hartford Fire*

Ins. Co. v. California, 509 U.S. 764, 770, 113 S.Ct. 2891, 2895-96, 125 L.Ed.2d 612 (1993).

In its Complaint, California asserts that the number of permanent illegal residents in California stands at 1.7 million – 5% of the state's population – and increases by approximately 125,000 a year. California further asserts that, in the fiscal year this action was initiated, it would spend nearly $2.4 billion in providing federally mandated education and health care benefits to illegal aliens and in incarcerating illegal aliens who commit crimes within the State.[3]

California's Complaint consists of eight claims. In Count I of its Complaint, California asserts that the United States has violated its obligations to protect the State from invasion and to guarantee it a republican form of government under the Invasion and Guarantee Clauses of Article IV of the United States Constitution by failing to stop the intrusion of illegal aliens across the State's borders. U.S.Const. art. IV, § 4. In Counts II and IX, California asserts that the United States has violated the Guarantee Clause and the Tenth Amendment to the United States Constitution by requiring the State to fund emergency health care costs for illegal immigrants, by causing the State to incur the costs of incarcerating illegal immigrants, and by causing the State to incur the costs of

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[3] California contends that 5% of the State's population is made up of illegal immigrants, and estimates that it spends $395 million a year providing emergency health care for illegal aliens, another $390 million on incarceration and parole supervision of illegal aliens, as well as $1.5 billion educating illegal aliens.

providing public schooling to illegal immigrants. In Count III, California seeks a declaration that the Attorney General has violated 8 U.S.C. § 1365 because she has not decided to reimburse the State for the costs incurred in incarcerating illegal aliens out of monies available, but not specifically appropriated, for that purpose. Finally, in Counts V through VIII,[4] California seeks declarative and injunctive relief because the Attorney General and the Commissioner of the INS failed to perform their statutory duties under 8 U.S.C. §§ 1252(I), 1252(a)(2), 1326 and 1252(c) by not conducting deportation proceedings immediately following the conviction of aliens eligible for deportation; failing to take into custody aliens convicted of aggravated felonies upon their release from state incarceration pending determination of deportability; failing to prosecute deported aliens who illegally reenter the country; and by failing to effectively execute final orders of deportation and instead merely "dropp[ing] off" the deported aliens at the U.S.-Mexican border.

II.

A. Invasion Clause

In Count I of its Complaint, California contends that the United States has violated its obligation under the Invasion Clause of Article IV, § 4 of the Constitution to protect the State from invasion.[5] California's claim under

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[4] California's Complaint does not contain a Count IV.

[5] The Invasion Clause states: "The United States . . . shall protect each of [the states] against Invasion." U.S.Const. art IV, § 4.

the Invasion Clause presents a nonjusticiable political question. In *Baker v. Carr,* the Supreme Court set forth the analysis that governs the political question doctrine. There, the Court stated:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962).

In this case, the issue of protection of the States from invasion implicates foreign policy concerns which have been constitutionally committed to the political branches. The Supreme Court has held that the political branches have plenary powers over immigration. *Fiallo v. Bell,* 430 U.S. 787, 792, 97 S.Ct. 1473, 1477-78, 52 L.Ed.2d 50 (1977). For this Court to determine that the United States has

been "invaded" when the political branches have made no such determination would disregard the constitutional duties that are the specific responsibility of other branches of government, and would result in the Court making an ineffective non-judicial policy decision. *See Barber v. Hawaii*, 42 F.3d 1185, 1199 (9th Cir.1994) (dismissing an Invasion Clause claim as a nonjusticiable political question). Additionally, even if the issue were properly within the Court's constitutional responsibility, there are no manageable standards to ascertain whether or when an influx of illegal immigrants should be said to constitute an invasion. The Court notes that the other Circuits that have addressed the issues before us in similar suits against the United States have reached the same conclusions that we do. *Padavan v. United States*, 82 F.3d 23, 28 (2nd Cir.1996); *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1674, 134 L.Ed.2d 777 (1996); *New Jersey v. United States*, 91 F.3d 463 (3rd Cir.1996); *Texas v. United States*, No. B-94-228 (S.D.Tex. Aug. 7, 1995), *appeal pending*, No. 95-40721 (5th Cir).

Moreover, California ignores the conclusion set forth by our Founders. In *The Federalist* No. 43, James Madison referred to the Invasion Clause as affording protection in situations wherein a state is exposed to armed hostility from another political entity. Madison stated that Article IV, § 4 serves to protect a state from "foreign hostility" and "ambitious or vindictive enterprises" on the part of other states or foreign nations. *The Federalist* No. 43 at 293

(Cooke ed.1961).[6] It was not intended to be used as urged by California.

B. Guarantee Clause

Counts I, II and IX of California's Complaint contend that federal immigration policy is violative of the Guarantee Clause of Article IV, § 4. The Guarantee Clause provides, "The United States shall guarantee to every State in this Union a Republican form of Government." U.S.Const. art. IV, § 4. California argues that federal immigration policy has forced it to spend money that it would otherwise not have been required to spend, thus depriving it of a republican form of government.

Supreme Court decisions have traditionally found that claims brought under the Guarantee Clause are nonjusticiable. *See New York v. United States*, 505 U.S. 144, 183-85, 112 S.Ct. 2408, 2432-33, 120 L.Ed.2d 120 (1992) (citing cases).[7] California's claims under the Guarantee Clause in Counts I, II, and IX raise nonjusticiable political questions. *See Padavan*, 82 F.3d at 28-29 (reaching the same result); *Chiles*, 69 F.3d at 1097 (reaching same result); *New Jersey*, 91 F.3d at 470.

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[6] *See Debate From the Virginia Convention* (June 16, 1788), *reprinted in* 10 *The Documentary History of the Ratification of the Constitution* 1299, 1312 (Kaminsky & Saladins eds., 1993). *See also Padavan*, 82 F.3d at 28 (citing *The Federalist* No. 43).

[7] As Justice O'Connor for an unanimous court in *New York v. United States* stated, in most cases in which the Court has been asked to apply the clause, the Court has found the claims to be nonjusticiable under the "political question" doctrine. *New York*, 505 U.S. at 184, 112 S.Ct. at 2432-33. (citations omitted).

Moreover, assuming, *arguendo*, that California has presented a justiciable claim, there is nothing in this record other than a mere bare contention that the federal government's policies deny California a republican form of government. The motion to dismiss was therefore properly granted.

C. Tenth Amendment

California's Tenth Amendment claims in Counts II and IX focus on three areas where it is asserted that the State is unconstitutionally being required by the United States to spend funds or where it is asserted that the United States has "commandeered" the state legislative process.[8] In all three instances, California has failed to state a claim under the Tenth Amendment.

1. Medicaid

California contends that the Federal Government's conditioning the receipt of Medicaid funds on the State's agreeing to provide emergency medical services to illegal aliens violates the Tenth Amendment. Under the Constitution, the Federal Government's conditioning of funds is permissible if (1) the spending, as in this case, is in furtherance of the general welfare; (2) Congress does so unambiguously to the end that states may knowingly exercise their choice to either accept or reject the funds;

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[8] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." U.S.Const. amend. X.

(3) the conditions imposed are reasonably related to the federal interest in the particular program; (4) no other constitutional provision "provide[s] an independent bar to the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. 203 at 207-08, 107 S.Ct. 2793 at 2796-97, 97 L.Ed.2d 171 (1987). California does not contend that Congress violated any of the aforementioned conditions; instead it argues that while its choice to participate in Medicaid may have been voluntary,[9] it now has no choice but to remain in the program in order to prevent a collapse of its medical system. It contends as well that the determination of when the moment of coercion has been reached is one of fact which cannot be decided via a motion to dismiss. California attempts to support this contention by reference to *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987), where the Court wrote, "[o]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' " *Id.* at 211, 107 S.Ct. at 2798 (citation omitted). The *Dole* court concluded, however, that it would only find Congress' use of its spending power impermissibly coercive, if ever, in the most extraordinary circumstances. *Dole*, 483 U.S. at 210-11, 107 S.Ct. at 2797-98.

The response to that contention long preceded this case when this Court responded to similar contentions by

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[9] The Supreme Court has noted that participation in the Medicaid scheme is voluntary, *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502, 110 S.Ct. 2510, 2513-14, 110 L.Ed.2d 455 (1990).

the State of Nevada in reference to the federal government's conditioning the receipt of highway funds on the acceptance of the national speed limit. In that case, Nevada contended that the threatened loss of ninety-five percent of its highway funds deprived it of any realistic choice as to whether to reject the uniform national limit. *Nevada v. Skinner*, 884 F.2d 445 at 448-49 (9th Cir.1989). In refusing the relief sought, the Court noted that no party challenging the conditioning of federal funds has ever succeeded under the coercion theory. *Id.* at 448 (citing *Oklahoma v. Schweiker*, 655 F.2d 401, (D.C.Cir.1981)). This court went on to state:

> [C]an a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds-or is the state merely presented with hard political choices? The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments.

Id. at 448 (footnotes omitted). The Court finds that to the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record. *See Padavan*, 82 F.3d at 28-29 (reaching same result); *New Jersey*, 91 F.3d at 466-67 (3d Cir.1996) (reaching same result).[10]

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[10] As to the argument that the issue was improperly decided at the motion to dismiss stage, the Eighth Circuit, in a decision affirmed by the Supreme Court, approved of the trial court's dismissal at this stage. *South Dakota v. Dole*, 791 F.2d 628, 634 (8th Cir.1986), *aff'd*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

2. Prisons

California also contends in Count IX that the United States has violated the Tenth Amendment because federal immigration policy causes the State to incur the costs of incarcerating those illegal aliens who commit crimes within the State. California reasons that because the United States has failed to effectively enforce its immigration policies, the Federal Government has essentially "commandeered" the State's legislative process by forcing California to allocate money and human resources to both incarcerate illegal alien felons and supervise their parole.

The Court concludes that California has failed to allege a Tenth Amendment violation because no federal mandate requires California to pursue a penal policy resulting in these costs. *See Padavan*, 82 F.3d at 28-29 (reaching same result); *New Jersey*, 91 F.3d at 467 (reaching same result).

3. Public Schools

Finally, California argues that the Federal Government has violated the Tenth Amendment because the State must allocate funds to pay for the public education of alien children. We note that this argument is merely a variation of California's claim that the Tenth Amendment is violated when it expends funds to incarcerate illegal aliens. Again, California contends that the costs of educating alien children stems from the Federal Government's ineffective policing of national borders. We find California's argument unpersuasive. Because the State's

obligation to provide this education derives from an independent constitutional obligation and not federal immigration policy, *see Plyler v. Doe*, 457 U.S. 202, 230, 102 S.Ct. 2382, 2401-02, 72 L.Ed.2d 786 (1982), the Tenth Amendment is not implicated. *See Padavan* 82 F.3d at 29 (reaching same result); *New Jersey*, 91 F.3d at 467 (reaching same result).

4. Failure to State a Claim

In each instance discussed above, the trial court properly dismissed California's claims because California failed to allege a viable Tenth Amendment violation. In addition to the foregoing, however, taking the facts in reference to immigration as accurate, as we must in considering a motion under Rule 12(b)(6), inevitably leads this Court to the conclusion that California's Tenth Amendment claims also present nonjusticiable political questions. The concerns expressed by California are unquestionably beyond the authority of the judicial branch.

D. Statutory Claims

1. Reimbursement for Costs of Incarceration

Under 8 U.S.C. § 1365, the Attorney General is authorized to reimburse states for the cost of incarcerating illegal aliens convicted of state crimes. Section 1365, however, does not appropriate any funds and is made

"[s]ubject to the amounts provided in advance in appropriation Acts." 8 U.S.C. § 1365(a).[11]

In Count III, California seeks a declaration that the Attorney General has violated § 1365 because she has not decided to reimburse the State for the costs incurred in incarcerating illegal aliens out of monies available, but not specifically appropriated, for that purpose. While the record reflects that no "amounts have been provided in advance," California urges that 8 U.S.C. § 1365 authorizes the Attorney General to allocate generally appropriated INS funds to this specific purpose.[12]

Assuming, without deciding, that California has correctly interpreted § 1365, the Attorney General's decision to allocate monies generally appropriated to her in a lump-sum for the administration of immigration laws for the specific purpose of reimbursing a State for the costs of incarcerating illegal aliens under 8 U.S.C. § 1365 is "committed to agency discretion by law" and is not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). *Lincoln v. Vigil*, 508 U.S. 182, 192, 113 S.Ct. 2024, 2031, 124 L.Ed.2d 101 (1993) ("The allocation of funds from a lump-sum appropriation is another

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[11] Title 8 U.S.C. § 1365(a) provides: "Subject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for the costs incurred by the State for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such State." 8 U.S.C. § 1365(a).

[12] California notes that the Attorney General can draw upon a lump-sum appropriation of $1,048,538,000 for INS salaries and expense as well as on increased fines and forfeitures authorized by 8 U.S.C. § 1330.

administrative decision traditionally regarded as committed to agency discretion."). Inasmuch as California may be seeking in Count III a further declaration that the Attorney General is authorized to allocate funds to the State to reimburse it for the costs of incarcerating illegal aliens, California seeks an unconstitutional advisory opinion. *See Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1509 (9th Cir.1994) ("A federal court has no jurisdiction to hear a case that cannot affect the litigants' rights.").

2. *Immigration Laws*

California has also brought several other statutory claims alleging that the Attorney General has failed to adequately fulfill her obligation to enforce the country's immigration laws, in particular, 8 U.S.C. §§ 1252(I); 1252(a)(2)(A); 1326; and 1252(c). Title 8 U.S.C. § 1252(I) provides that "[i]n the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of conviction." 8 U.S.C. § 1252(I). In Count VI, California seeks a declaration and injunctive relief on the basis that the Attorney General and the Commissioner of the INS have violated § 1252(I) by adopting a policy of not commencing deportation proceedings until shortly before convicted illegal aliens are to be released from confinement.

Title 8 U.S.C. § 1252(a)(2)(A) provides that the Attorney General "shall take into custody any alien convicted of an aggravated felony upon release of the alien [from

state custody or supervision]." 8 U.S.C. § 1252(a)(2)(A). In Count VI, California seeks a declaration and injunctive relief on the basis that the Attorney General and the Commissioner of the INS violated the terms of this section by failing to take into custody aliens convicted of aggravated felonies upon their release from state incarceration pending determination of deportability.

Title 8 U.S.C. § 1326 provides that a person who enters the country illegally after being deported is guilty of a crime. In Count VII, California seeks equitable relief on the basis that the Attorney General has violated this section by prosecuting deported aliens who illegally reenter the country only in cases where the aliens are serious repeat offenders.

With respect to sections 1252(I), 1252(a)(2)(A) and 1326, the Court cannot, with propriety, address the issues raised. In *Heckler v. Chaney*, 470 U.S. 821, 838, 105 S.Ct. 1649, 1659, 84 L.Ed.2d 714 (1985) the Supreme Court held that "agency refusals to institute investigative or enforcement proceedings" fall within the "exception to reviewability provided by [5 U.S.C.] § 701(a)(2) for action 'committed to agency discretion.' " Each of the claims asserted by California under these statutes implicates the institution of enforcement actions of the variety contemplated in *Heckler*. As the Court noted in *Heckler*, "[a]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." 470 U.S. at 831, 105 S.Ct. at 1655. Accordingly, these issues, having been committed to agency discretion, are not subject to judicial review. While the Supreme Court in *Heckler* did state in a footnote that a non-enforcement decision might

be reviewable where "the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities", *Heckler*, 470 U.S. at 833 n. 4, 105 S.Ct. at 1656 n. 4, the allegations asserted in the instant Complaint do not rise to a level that would indicate such an abdication.

Finally, California seeks declaratory and injunctive relief in Count VIII in the form of a declaration that the Attorney General and Commissioner of the INS have failed to effectively execute final orders of deportation pursuant to 8 U.S.C. § 1252(c). In particular, the State seeks a declaration that the Attorney General has a duty to adopt policies for the administration of § 1252(c) that are consistent with the ruling of this Court. The State seeks as well to enjoin the Attorney General from continuing to implement a policy that allows "drop off" border deportation for cost transfer and cost saving purposes.

Section 1252(c) provides that "the Attorney General shall have a period of six months" following a final order of deportation "to effect the alien's departure from the United States." 8 U.S.C. § 1252(c). The statute does not define "departure" or otherwise specify any method of effecting deportation.

Because the Attorney General and the Commissioner of the INS reasonably interpret the statute in determining that delivery of an alien to the border "effect[s] the alien's departure from the United States," the Court defers to that interpretation. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). For the reasons previously

stated concerning agency discretion and the Court's lack of authority to review agency actions as discussed in *Heckler*, California has failed to state a claim in Count VIII.

III.

Sovereign Immunity

California contends that the trial court erred in dismissing Counts I, II, III and IX on the alternative grounds that suits against the United States are barred by sovereign immunity to the extent that monetary awards are sought. We agree that even if the State had asserted a justiciable claim seeking federal funds, such a claim would be barred by the doctrine of sovereign immunity in the absence of Congress having explicitly waived such immunity. *See Block v. North Dakota*, 461 U.S. 273, 280, 103 S.Ct. 1811, 1816, 75 L.Ed.2d 840 (1983) ("The States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress.").

California contends that it seeks "reimbursement" and/or "restitution" as distinguished from "money damages." The State premises its argument on the waiver of sovereign immunity contained in 5 U.S.C. § 702 which states in pertinent part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity under color of legal authority shall not be

> dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702.

While reliance on 5 U.S.C. § 702 is not well taken because the statute specifically exempts "money damages," regardless of its terminology, the "restitution" or "reimbursement" sought is monetary compensation for the monetary damage each state has suffered. The relief California seeks is therefore barred by the Constitution.

IV.

The Court having concluded that all of the claims asserted by the State of California were properly dismissed, the judgment of the district court is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

STATE OF ARIZONA, et al.,

Plaintiffs,

V.

UNITED STATES OF AMERICA,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CIV 94-866-PHX-SMM

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED having granted the Defendants' Motion to Dismiss, Plaintiff shall take nothing and the complaint and action are hereby dismissed.

APR 18 1995
Date

RICHARD H. WEARE
Clerk

/s/ A L Larsen A L LARSEN
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA; FIFE SYMINGTON, III, Governor; SAMUEL A. LEWIS, Director, Arizona Department of Corrections; EUGENE R. MOORE, Director of Arizona Department of Youth Rehabilitation, Plaintiffs, v. UNITED STATES OF AMERICA; JANET RENO, Attorney General of the United States; DORIS MEISSNER, Commissioner, Immigration and Naturalization Service; ALICE RIVLIN, Director, Office of Management and Budget, Defendants.	CIV-94-0866-PHX-SMM ORDER

I. INTRODUCTION

On May 2, 1994, Plaintiffs brought suit against the United States of America and several of its individual officers ("the Government"). Plaintiffs initiated this action in response to the significant number of illegal aliens entering Arizona through Mexican borders. Plaintiffs claim that the Government has failed to properly enforce immigration policies, thereby forcing Arizona to

pay millions of dollars to incarcerate those aliens who enter Arizona illegally and commit felonies under Arizona law.[1] Plaintiffs assert that the Government should bear responsibility for the illegal aliens who commit crimes in Arizona.

Plaintiffs allege in Counts I and III that the Government has violated the Tenth Amendment and the Guaranty and Invasion Clauses of Article IV, Section 4, of the Constitution. Specifically, Plaintiffs claim that the Government has failed to protect Arizona from an invasion of illegal aliens and has required Arizona to pay to incarcerate illegal aliens, thereby frustrating Arizona's republican form of government. Count II alleges that pursuant to the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §1365(a), the Government must reimburse Arizona for costs incurred in incarcerating illegal alien felons, but that the Government has failed to provide full reimbursement. Plaintiffs ask the Court to: (1) require the Government to fully reimburse Plaintiffs for the cost of imprisoning illegal alien felons; and (2) declare that the Government, through policies of nonenforcement, has failed to perform its duties under the Constitution, Article IV, Section 4.[2]

---

[1] Plaintiffs state that illegal aliens comprise approximately ten percent of the prison population in Arizona. *See* Amended Complaint, at 11. Plaintiffs further state that the cost of incarceration is roughly $15,773 per inmate each year. *Id.*

[2] The Court notes that other border states including Florida and California have recently sought similar relief without success. *See Chiles v. United States*, 874 F. Supp. 1334 (S.D. Fla. 1994); *California v. United States*, No. 94-0674-K(CM) (S.D. Cal. Feb. 13, 1995).

The Government has responded by filing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The Government argues that Counts I and II fail to state a claim because: (1) the claims present a nonjusticiable political question; (2) Plaintiffs lack standing to raise the claims; (3) the doctrine of sovereign immunity bars the claims; and (4) the claims lack merit. The Government argues that Count II fails to state a claim because IRCA authorizes the Attorney General to reimburse Plaintiffs only after Congress has appropriated and earmarked funds for state reimbursement. The Government asserts that Congress has appropriated approximately $130,000,000 to the Attorney General for state reimbursement. The Government further asserts that although Congress has made a lump-sum appropriation toward the general operating budget of the Immigration and Naturalization Service ("INS"), Congress did not earmark any of these funds for state reimbursement; therefore, use of these funds is within the discretion of the Attorney General.

The parties briefed the Motion to Dismiss and presented oral argument to the Court on April 3, 1995. The matter is now ready for the Court's consideration.

II. STANDARD OF REVIEW

A court should dismiss a complaint if it appears beyond doubt that a plaintiff can prove no set of facts in support of a claim that would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Hunt-Wesson Foods, Inc. v. Ragu Foods*, 627 F.2d 919, 924 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981). In deciding a motion to

dismiss, a court must presume all factual allegations of the complaint to be true and make all reasonable inferences in favor of the non-moving party. *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 27 n.2 (1977); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981). However, legal conclusions or characterizations in a complaint do not preclude disposal of a case on a motion to dismiss merely because they are cast in the form of factual allegations, as such conclusions or characterizations are not entitled to a presumption of truthfulness. *Western Mining*, 643 F.2d at 624.

III. DISCUSSION

A. Article IV, Section 4

Article IV, Section 4, of the Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion. . . . " Plaintiffs assert that the Government has allowed illegal aliens to "invade" Arizona, thereby requiring Arizona to spend state funds to incarcerate those aliens who commit state crimes. Plaintiffs assert that this compelled allocation of state funds deprives Arizona of a republican form of government.

1. *Protection from Invasion*

Defendants assert that Plaintiffs' claim under the Invasion Clause must fail because the clause is limited to military invasions and does not create a cause of action against the Government. *See* U.S. Const., art. I, § 8, cl. 15

(empowering Congress to call forth the militia to repeal invasions); *see also The Federalist No. 43*, at 293 (James Madison) (Jacob E. Cooke ed. 1961) (noting that the Invasion Clause refers to "foreign hostility"). Plaintiffs argue that the term "invasion" must be interpreted broadly to encompasses [sic] mass immigrations as well as foreign military invasions. Plaintiffs rely principally on *Ping v. United States*, 130 U.S. 581 (1889) for this proposition. Therein, the Supreme Court stated:

> "To preserve its independence, and give security against foreign aggression or encroachment, is the highest duty of every nation. . . . It matters not in what form such aggression and encroachment come, whether from a foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.

Id. at 606. The Supreme Court's holding in that case, however, was limited. The Court simply held that Congress has the nondelegable power to set the nation's immigration policy. *Id.* at 609. This holding did not result from a detailed analysis of the Invasion Clause. Thus, viewing alien migration as an invasion that justifies enjoining Government acts or awarding Government reimbursement does not necessarily follow from the determination that the Government has the right to set an immigration policy. Accordingly, the Court does not find Plaintiffs' argument for an expansive interpretation of the Invasion Clause persuasive.

Even assuming that the Invasion Clause encompasses mass migrations, the Government argues that the political question doctrine excludes the claim from review. The political question doctrine precludes judicial review of

disputes that center on policy choices or value determinations that the Constitution has committed to the Legislative or Executive Branch for resolution. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The Judiciary is not properly equipped to make national policies; the judiciary may define standards only for those matters that are legal in nature. *Id.* To decide if the political question doctrine precludes judicial review of a claim, the court should consider whether there has been a constitutional commitment of the issue to one of the political branches and whether manageable criteria exist for rendering a judicial determination. *Nixon v. United States*, ___ U.S. ___, 113 S. Ct. 732, 735 (1993); *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Congress possesses complete legislative authority over the admission of aliens. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Congress's determinations on policies designed to control immigration are "conclusive upon the judiciary." *Ping*, 130 U.S. at 606. As District Judge Davis recognized in Florida's similar challenge to the Government's immigration policies:

> [T]o grant the [relief] requested by Plaintiffs, the Court would be forced to review the United States entire enforcement of Federal immigration laws including the enforcement methods used and their effectiveness, determine the reasonableness of budget allocations, determine whether more resources are available and, if so, decide how those addition[al] resources should be allocated. The Court is unable to identify satisfactory criteria for making these determinations.

Chiles, 874 F. Supp at 1343. Further, no judicially manageable standards exist for the Court to apply to determine if and when a migration of immigrants becomes an "invasion." *Id.* Accordingly, Plaintiffs' challenge under the Invasion Clause presents a political question better left to the political branches. *See Baker*, 369 U.S. at 217; *see also Barber v. Hawaii*, 42 F.3d 1185, 1198-99 (9th Cir. 1994) (claim that federal and state government allowed an economic invasion of Hawaii by Japan dismissed as a nonjusticiable political question). The Court will therefore dismiss Plaintiffs' claim to the extent it relies on the Invasion Clause.

2. *Guarantee of a Republican Form of Government*

Courts traditionally have viewed claims brought under the Guarantee Clause as nonjusticiable political questions. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980); *Baker*, 369 U.S. at 218-29; *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 140-151 (1912); *Nevada v. Watkins*, 914 F.2d 1545, 1559 (9th Cir. 1990) *cert. denied*, 499 U.S. 906 (1991). Although the Supreme Court has suggested recently that courts may address some Guarantee Clause claims, depending on their nature, the Court declined to rule that the political question doctrine no longer bars the judiciary from resolving any Guarantee Clause claim. *See New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408, 2433 (1992). The Court further declined to provide guidance as to which Guarantee Clause claims may be appropriate for judicial resolution. *Id.* Without guidance from the Court or meaningful criteria submitted by Plaintiffs, this Court cannot discern

manageable standards to apply in determining if and when the costs of incarcerating illegal aliens somehow deprive Arizona of a republican form of government. Therefore, Plaintiffs' Guarantee Clause claim does not present a justiciable claim.

Even if Plaintiffs' claim were justiciable the financial burden of incarcerating illegal aliens cannot reasonably be interpreted as denying Arizona a republican form of government. Arizona's legislature retains the power to allocate state funds and set state policy. Arizona's legislature remains accountable to Arizona's voters for its policy choices. Thus, Plaintiffs have failed to allege facts demonstrating that the Government's actions have denied Arizona a republican form of government. Accordingly, the Court will dismiss Plaintiffs' claim to the extent it relies on the Guarantee Clause.

B. The Tenth Amendment

States reserve sovereignty over those powers that the Constitution has neither delegated to the federal government nor precluded the states from exercising. U.S. Const. amend. X. Thus, the Government cannot "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc.*, 452 U.S. 264, 288 (1981). Plaintiffs argue that by failing to effectively control immigration and refusing to fully reimburse Arizona for the costs associated with illegal immigrants, the Government has shifted the costs of its immigration policy onto Arizona in violation of the Tenth Amendment. Plaintiffs assert that

Arizona is "left with no choice but to pay" to incarcerate illegal alien felons. Plaintiffs' Response to Defendant's Motion to Dismiss, at 15.

Plaintiffs' Tenth Amendment argument is flawed. The cost of incarcerating illegal aliens results not from federal law but from Arizona's own decision to prosecute illegal aliens for criminal offenses defined by Arizona law. The Government did not command Arizona to enact and enforce a criminal code. Accordingly, the Government has not "commandeered" Arizona's legislative process in violation of the Tenth Amendment. The Court will therefore dismiss Plaintiffs' Tenth Amendment claim.

C. IRCA

Plaintiffs argue that IRCA mandates the Government to fully reimburse Arizona for its costs incurred in incarcerating illegal alien felons. IRCA provides:

> Subject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for the costs incurred by the State for the imprisonment of any illegal alien.

8 U.S.C. § 1365. Plaintiffs acknowledge that Congress appropriated $130,000,000 specifically to reimburse the States for the costs incurred in imprisoning illegal aliens. *See* Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 103-317, 108 Stat. 1724 (1995). Plaintiffs state, however, that the reimbursement Arizona will receive under Public Law 103-317 is insufficient. Plaintiffs also concede that Public Law 103-122 will provides [sic] some, but not all, reimbursement sought. *See* Department of Transportation

and Related Agencies Appropriations Act, Pub. L. No. 103-122, 107 Stat. 1198 (1994). Plaintiffs submit, however, that Congress has appropriated additional funds available for use in reimbursing the states. Specifically, Plaintiffs claim that Congress's lump-sum appropriation in Public Law 103-121 to the Attorney General for the overall operating budget of INS is available for reimbursement to the states. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 103-121, 107 Stat. 1160 (1994). Additionally, Plaintiffs argue that the appropriation in 8 U.S.C. § 1330(b) of revenues from increased fines and forfeitures for violations of immigration laws to the INS operating budget, provides funds available for reimbursement purposes. Plaintiffs assert that the Attorney General is required to make funds available to Arizona pursuant to the appropriations made by Public Law 103-121 and 8 U.S.C. § 1330.

The Government contends that the doctrine of sovereign immunity bars Plaintiffs' claim for reimbursement. The Government further argues that the lump-sum appropriations made under Public Law 103-121 and 8 U.S.C. § 1330 were not earmarked for state reimbursement so that allocation of these funds is within the Attorney General's discretion and is therefore precluded from judicial review.

No entity may sue the Government absent Congress's express waiver of sovereign immunity. *Block v. North Dakota*, 461 U.S. 273, 280 (1983). Plaintiffs apparently rely on the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, to demonstrate a waiver of immunity. Section 702 permits challenges to agency action that seek relief "other

than money damages." The Supreme Court has interpreted § 702 broadly and allowed actions where a plaintiff has a specific claim to existing property or money, rather than a claim for general monetary damages. *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1985). The appropriations to which Plaintiffs lay claim, however, are lump-sum appropriations for the overall operating budget of the INS, rather than a specific appropriation for reimbursement of the states. Thus, sovereign immunity bars Plaintiffs' claim for reimbursement, despite the Supreme Court's liberal interpretation of § 702 in *Bowen*. *See id.*

Furthermore, the Supreme Court has recently held that "[t]he allocation of funds from a lump-sum appropriation is [an] administrative decision traditionally regarded as committed to agency discretion." *Lincoln v. Vigil*, ___ U.S. ___, 113 S. Ct. 2024, 2031 (1993) (holding the APA, 5 U.S.C. § 701(a)(2) precludes courts from reviewing agency disbursement of lump-sum appropriations). The Court noted that a lump-sum appropriation allows the recipient agency to allocate the funds between some or all of the permissible objectives without restrictions imposed by Congress. *Id.* In making a lump-sum appropriation, Congress recognizes that the agency has expertise in determining a distribution plan that would best serve the agency's needs. *Id.* at 2032. Given this expertise, the Court held that the judiciary is not equipped to review an agency's exercise of discretion in allocating lump-sum appropriations. *Id.*

Plaintiffs seek to obtain reimbursement from lump-sum allocations pursuant to Public Law 103-121 and 8

U.S.C. § 1330. Because disbursement of the funds allocated under these laws is within the Attorney General's discretion, Plaintiffs' claim for reimbursement is not a proper subject for judicial review. *See id.* To the extent that Plaintiffs ask this Court to rule that the Attorney General has the discretion to allocate the funds appropriated under Public Law 103-121 and 8 U.S.C. § 1330 to the states for reimbursement, this claim is similarly inappropriate for review. Such a ruling would neither fix rights nor set liabilities because the disbursement of the lump-sum appropriations would nonetheless remain discretionary. Accordingly, such a ruling would represent a prohibited advisory opinion. *See, e.g., Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-41 (1937); *Native Village of Noatak v. Blatchford,* 38 F.3d 1505, 1509 (9th Cir. 1994) (noting district court "has no jurisdiction to hear a case that cannot affect the litigants' rights"). Accordingly, the Court will dismiss Count II.

IV. CONCLUSION

The Court recognizes that the entry of illegal aliens disproportionately burdens border states such as Arizona. The Court further recognizes that the financial impact of illegal aliens on Arizona is indeed severe. However, the judiciary simply is not equipped to address the effectiveness of the nation's immigration policy or afford appropriate relief. These matters are best resolved by the political branches.[3]

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[3] Because the Court has addressed the heart of this dispute and determined that these claims present nonjusticiable political questions, the Court need not address the

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss is GRANTED.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly.

DATED this 17 day of April, 1995.

/s/ Stephen M. McNamee
Stephen M. McNamee
United States District Judge

Government's argument that Plaintiffs' lack standing to assert the claims.

APPENDIX D

ARTICLE 4

CONSTITUTION OF THE UNITED STATES

§ 4. Guarantee of republican form of government

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

CONSTITUTION OF THE UNITED STATES
TENTH AMENDMENT

Reserved powers to states

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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5 U.S.C. § 702

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the

United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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8 U.S.C. § 1330 (Supp. 1994)

§ 1330. Collection of penalties and expenses

(a) Notwithstanding any other provisions of this subchapter, the withholding or denial of clearance of or a lien upon any vessel or aircraft provided for in section 1221, 1227, 1229, 1253, 1281, 1283, 1284, 1285, 1286, 1321, 1322, or 1323 of this title shall not be regarded as the sole and exclusive means or remedy for the enforcement of payments of any fine, penalty or expenses imposed or incurred under such sections, but, in the discretion of the

Attorney General, the amount thereof may be recovered by civil suit, in the name of the United States, from any person made liable under any of such sections.

(b) Notwithstanding section 3302 of Title 31, the increase in penalties collected resulting from the amendments made by sections 203(b), 543(a), and 544 of the Immigration Act of 1990 shall be credited to the appropriation –

(1) for the Immigration and Naturalization Service for activities that enhance enforcement of provisions of this subchapter, including –

(A) the identification, investigation, and apprehension of criminal aliens,

(B) the implementation of the system described in section 1252(a)(3)(A) of this title, and

(C) for the repair, maintainance[1], or construction on the United States border, in areas experiencing high levels of apprehensions of illegal aliens, of structures to deter illegal entry into the United States; and

(2) for the Executive Office for Immigration Review in the Department of Justice for the purpose of removing the backlogs in the preparation of transcripts of deportation proceedings conducted under section 1252 of this title.

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[1] So in original. Probably should be "maintenance".

8 U.S.C. § 1330 (Supp. 1997)

§ 1330. Collection of penalties and expenses

(a) Notwithstanding any other provisions of this subchapter, the withholding or denial of clearance of or a lien upon any vessel or aircraft provided for in section 1221, 1227, 1229, 1253, 1281, 1283, 1284, 1285, 1286, 1321, 1322, or 1323 of this title shall not be regarded as the sole and exclusive means or remedy for the enforcement of payments of any fine, penalty or expenses imposed or incurred under such sections, but, in the discretion of the Attorney General, the amount thereof may be recovered by civil suit, in the name of the United States, from any person made liable under any of such sections.

(b)(1) There is established in the general fund of the Treasury a separate account which shall be known as the "Immigration Enforcement Account". Notwithstanding any other section of this subchapter, there shall be deposited as offsetting receipts into the Immigration Enforcement Account amounts described in paragraph (2) to remain available until expended.

(2) The amounts described in this paragraph are the following:

> (A) The increase in penalties collected resulted from the amendments made by sections 203(b) and 543(a) of the Immigration Act of 1990.
>
> (B) Civil penalties collected under sections 1232(d), 1324c, 1324d, and 1325(b) of this title.

(3)(A) The Secretary of the Treasury shall refund out of the Immigration Enforcement Account to any

appropriation the amount paid out of such appropriation for expenses incurred by the Attorney General for activities that enhance enforcement of provisions of this subchapter. Such activities include –

(i) the identification, investigation, apprehension, detention, and removal of criminal aliens;

(ii) the maintenance and updating of a system to identify and track criminal aliens, deportable aliens, inadmissible aliens, and aliens illegally entering the United States; and

(iii) for the repair, maintenance, or construction on the United States border, in areas experiencing high levels of apprehensions of illegal aliens, of structures to deter illegal entry into the United States.

(B) The amounts which are required to be refunded under subparagraph (A) shall be refunded at least quarterly on the basis of estimates made by the Attorney General of the expenses referred to in subparagraph (A). Proper adjustments shall be made in the amounts subsequently refunded under subparagraph (A) to the extent prior estimates were in excess of, or less than, the amount required to be refunded under subparagraph (A).

(C) The amounts required to be refunded from the Immigration Enforcement Account for fiscal year 1996 and thereafter shall be refunded in accordance with estimates made in the budget request of the Attorney General for those fiscal years. Any proposed changes in the amounts designated in such budget requests shall only be

made after notification to the Committees on Appropriations of the House of Representatives and the Senate in accordance with section 605 of Public Law 104-134.

(D) The Attorney General shall prepare and submit annually to the Congress statements of financial condition of the Immigration Enforcement Account, including beginning account balance, revenues, withdrawals, and ending account balance and projection for the ensuing fiscal year.

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8 U.S.C. § 1365

§ 1365. Reimbursement of States for costs of incarcerating illegal aliens and certain Cuban nationals

(a) Reimbursement of states

Subject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for the costs incurred by the State for the imprisonment of any illegal alien or Cuban national, who is convicted of a felony by such State.

(b) Illegal aliens convicted of a felony

An illegal alien referred to in subsection (a) of this section is any alien who is any alien convicted of a felony who is in the United States unlawfully and –

(1) whose most recent entry into the United States was without inspection, or

(2) whose most recent admission to the United States was as a nonimmigrant and –

(A) whose period of authorized stay as a nonimmigrant expired, or

(B) whose unlawful status was known to the Government, before the date of the commission of the crime for which the alien is convicted.

(c) Marielito Cubans convicted of a felony

A Marielito Cuban convicted of a felony referred to in subsection (a) of this section is a national of Cuba who –

(1) was allowed by the Attorney General to come to the United States in 1980,

(2) after such arrival committed any violation of State or local law for which a term of imprisonment was imposed, and

(3) at the time of such arrival and at the time of such violation was not an alien lawfully admitted to the United States –

(A) for permanent or temporary residence, or

(B) under the terms of an immigrant visa or a nonimmigrant visa issued, under the laws of the United States.

(d) Authorization of appropriation

There are authorized to be appropriated such sums as are necessary to carry out the purposes of this section.

(e) State defined

The term "State" has the meaning given such term in section 1101(a)(36) of this title.

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28 U.S.C. § 2201

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

Pub. L. No. 103-121, 107 Stat. 1153, 1160 (1993)

* * *

IMMIGRATION AND NATURALIZATION SERVICE

SALARIES AND EXPENSES

For expenses, not otherwise provided for, necessary for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration, including not to exceed $50,000 to meet unforeseen emergencies of a confidential character, to be expended under the direction of, and to be accounted for solely under the certificate of, the Attorney General; purchase for police-type use (not to exceed 597 of which 302 are for replacement only) without regard to the general purchase price limitation for the current fiscal year, and hire of passenger motor vehicles; acquisition, lease, maintenance and operation of aircraft; and research related to immigration enforcement; $1,048,538,000, of which not to exceed $400,000 for research shall remain available until expended, and of which not to exceed $10,000,000 shall be available for costs associated with the Training program for basic officer training: *Provided,* That none of the funds available to the Immigration and Naturalization Service shall be available for administrative expenses to pay any employee overtime pay in an amount in excess of $25,000: *Provided further,* That uniforms may be purchased without regard to the general purchase price limitation for the current fiscal year: *Provided further,* That not to exceed $5,000 shall be available for official reception and representation expenses.

* * *

Pub. L. No. 103-317, 108 Stat. 1725, 1778 (1994)

* * *

STATE CRIMINAL ALIEN ASSISTANCE PROGRAM

For necessary expenses, as authorized by section 501 of the Immigration Reform and Control Act of 1986, as amended (8 U.S.C. 1365), ($130,000,000, to remain available until expended: *Provided,* That the Attorney General shall promulgate regulations to (a) prescribe requirements for program participation eligibility for States, (b) require verification by States of the eligible incarcerated population data with the Immigration and Naturalization Service, (c) prescribe a formula for distributing assistance to eligible States, and (d) award assistance to eligible States: *Provided further,* That of the amount appropriated herein, one-third shall be distributed on a preliminary basis no later than 120 days after the beginning of the fiscal year, according to regulations promulgated by the Attorney General: *Provided further,* That the remaining two-thirds of the amount appropriated herein shall be distributed after final application for program participation to be submitted by the States by September 30, 1995: *Provided further,* That not to exceed one percentum of the amount appropriated herein shall be available for salaries and expenses for management and administration to be transferred to and merged with the appropriations for Justice Assistance.

* * *

"(4)(A) In carrying out paragraph (1), the Attorney General shall give priority to the Federal incarceration of undocumented criminal aliens who have committed aggravated felonies.

"(B) The Attorney General shall ensure that undocumented criminal aliens incarcerated in Federal facilities pursuant to this subsection are held in facilities which provide a level of security appropriate to the crimes for which they were convicted.

"(5) There are authorized to be appropriated such sums as may be necessary to carry out this subsection, of which the following amounts may be appropriated from the Violent Crime Reduction Trust Fund:

"(A) $130,000,000 for fiscal year 1995;

"(B) $300,000,000 for fiscal year 1996;

"(C) $330,000,000 for fiscal year 1997;

"(D) $350,000,000 for fiscal year 1998;

"(E) $350,000,000 for fiscal year 1999; and

"(F) $340,000,000 for fiscal year 2000.".

(b) EFFECTIVE DATE. – The amendment made by subsection (a) shall take effect October 1, 1994.

(c) TERMINATION OF LIMITATION. – Notwithstanding section 242(j)(5) of the Immigration and Nationality Act, as added by subsection (a), the requirements of section 242(j) of the Immigration and Nationality Act, as added by subsection (a), shall not be subject to the availability of appropriations on and after October 1, 2004.

* * *

Pub. L. No. 103-322, 108 Stat. 1823-24 (1994)

* * *

SEC. 20301. INCARCERATION OF UNDOCUMENTED CRIMINAL ALIENS.

(a) INCARCERATION. – Section 242 of the Immigration and Nationality Act (8 U.S.C. 1252) is amended by adding at the end the following new subsection:

"(j) INCARCERATION. –

"(1) If the chief executive officer of a State (or, if appropriate, a political subdivision of the State) exercising authority with respect to the incarceration of an undocumented criminal alien submits a written request to the Attorney General, the Attorney General shall, as determined by the Attorney General –

"(A) enter into a contractual arrangement which provides for compensation to the State or a political subdivision of the State, as may be appropriate, with respect to the incarceration of the undocumented criminal alien; or

"(B) take the undocumented criminal alien into the custody of the Federal Government and incarcerate the alien.

"(2) Compensation under paragraph (1)(A) shall be the average cost of incarceration of a prisoner in the relevant State as determined by the Attorney General.

"(3) For purposes of this subsection, the term 'undocumented criminal alien' means an alien who –

"(A) has been convicted of a felony and sentenced to a term of imprisonment; and

"(B)(i) entered the United States without inspection or at any time or place other than as designated by the Attorney General;

"(ii) was the subject of exclusion or deportation proceedings at the time he or she was taken into custody by the State or a political subdivision of the State; or

"(iii) was admitted as a nonimmigrant and at the time he or she was taken into custody by the State or a political subdivision of the State has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 248, or to comply with the conditions of any such status.

Supreme Court, U.S.
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Nos. 96-1595 and 96-1596

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARIZONA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' contention that the federal government has violated the Invasion Clause of Article IV, Section 4 of the Constitution by failing to prevent the presence of illegal aliens in the States of California and Arizona presents a justiciable claim.

2. Whether the federal requirement that States must provide emergency medical treatment for illegal aliens under the Medicaid program if they are to receive federal Medicaid funds, or the fact that the State incurs substantial costs in incarcerating illegal aliens who commit crimes within the State, violates the Tenth Amendment.

3. Whether petitioners' claim that the Attorney General should use a lump-sum appropriation earmarked for the general enforcement of the immigration laws by the Immigration and Naturalization Service (INS) to reimburse States for the costs of incarcerating illegal aliens for violation of state-law offenses is subject to judicial review under the Administrative Procedure Act.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 96-1596 (Pet. App. 1-24[1]) is reported at 104 F.3d 1086. The order of the court of appeals in No. 96-1595 (96-1595

[1] Except as otherwise indicated, references to "Pet. App." are to the Appendix to the Petition in No. 96-1596.

Pet. App. 1) is reported at 104 F.3d 1095. The opinion of the district court in No. 96-1596 (Pet. App. 1-49) is unreported. The opinion of the district court in No. 96-1595 (96-1595 Pet. App. 24-36) is unreported.

JURISDICTION

The judgments of the court of appeals in both cases were entered on January 7, 1997. The petitions for a writ of certiorari in both cases were filed on April 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners in No. 96-1596—the State of California, Governor Pete Wilson, the state director of finance, and officials of state youth, correctional, and public health agencies—brought suit asserting a variety of constitutional and statutory claims against the United States and federal officials with regard to the migration of illegal aliens into California. Among other contentions, petitioners claimed that the federal government's failure to prevent an influx of illegal aliens into California constitutes a violation of the Invasion Clause of the Constitution. Pet. App. 11. That Clause provides that the United States shall "guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion." Art. 4, § 4.

Petitioners also alleged violations of the Tenth Amendment. They claimed that the United States had unconstitutionally conditioned California's receipt of federal Medicaid funds on the State's provision and partial funding of emergency medical care under the Medicaid program to needy illegal aliens. Petitioners also claimed that federal immigration policy violates the Tenth Amendment because it

causes the State to incur the costs of incarcerating illegal aliens who commit crimes within the State. Pet. App. 15-17.

Petitioners' complaint sought reimbursement for the State's costs of providing emergency medical care, public education, and incarceration to illegal aliens. Petitioners also sought a declaration that the Attorney General violated 8 U.S.C. 1365, which authorizes distribution of appropriated funds to the States to compensate them for the costs of incarcerating illegal aliens convicted of state felonies, because she had failed to provide petitioners with reimbursement out of funds that were available but that had not been specifically appropriated for that purpose. Pet. App. 8-11.[2]

b. In No. 96-1596, the district court granted the federal government's motion to dismiss petitioners' complaint under Federal Rule of Civil Procedure 12(b)(6). Although the court rejected petitioners' contention that the illegal migration of aliens into the United States constitutes the sort of "invasion" that could trigger Article IV, Section 4, see Pet. App. 32-34, the court ultimately held that the Invasion Clause claim presents "a non-justiciable, political question solely in the hands of Congress and the Executive Branch." *Id.* at 34. The court explained that the Constitution commits matters concerning immigration to Congress, not the courts, and that in any event "there

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[2] Section 1365(a) provides:

> Subject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for the costs incurred by the State for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such State.

is simply no judicially * * * manageable standard to determine at what point a migration becomes an invasion under Article IV." *Id.* at 35.

The district court also rejected petitioners' Tenth Amendment claims. Pet. App. 37-39. The court held that the statute conditioning a State's receipt of federal Medicaid funds on its agreement to provide medical care for needy illegal immigrants is a "valid condition" on receipt of federal funds that "is not coercive for purposes of the Tenth Amendment." *Id.* at 37, 38. The court noted that petitioners' argument that the condition is invalid would lead to the unusual conclusion "that the Federal Government couldn't even eliminate its allocation of Medic[aid] funds because the states are dependent." *Id.* at 38. The court rejected petitioners' claim that the United States is responsible under the Tenth Amendment for their incarceration of illegal aliens who commit crimes, "because the cost of incarcerating illegal aliens stems not from federal law but from the State's obligation to enforce its own law and its prosecution of illegal aliens for state criminal offenses." *Id.* at 41.

Finally, the district court held that petitioners' claims for reimbursement of the costs of educating, incarcerating, and providing health care are in any event barred by sovereign immunity. The court noted that the Administrative Procedure Act, 5 U.S.C. 702, does not provide a waiver of the United States' sovereign immunity from monetary claims and that petitioners' claims, though pleaded "as equitable and in the nature of restitution and reimbursement," are "in fact claims for money damages, against which [respondents] are immune." Pet. App. 47-48.

2. a. Petitioners in No. 96-1595—the State of Arizona, Governor Fife Symington, III, and the directors

of state correctional and youth agencies—brought a suit similar to that brought by the California plaintiffs, asserting similar constitutional and statutory claims against the United States and federal officials with regard to the migration of illegal aliens into Arizona.

b. In No. 96-1595, the district court rejected petitioners' claims. 96-1595 Pet. App. 24-36. With respect to the Invasion Clause claim, the court held that "[petitioners'] challenge under the Invasion Clause presents a political question best left to the political branches." *Id.* at 30. The court noted that "Congress possesses complete legislative authority over the admission of aliens," *id.* at 29, and that "no judicially manageable standards exist for the [c]ourt to apply to determine if and when a migration of immigrants becomes an 'invasion,'" *id.* at 30. The court also rejected petitioners' Tenth Amendment claim regarding the costs of incarcerating illegal aliens, holding that "the [federal] Government has not 'commandeered' Arizona's legislative process" and that "[t]he cost of incarcerating illegal aliens results not from federal law but from Arizona's own decision to prosecute illegal aliens for criminal offenses defined by Arizona law." *Id.* at 32.

The court also held that sovereign immunity barred petitioners' claim for reimbursement under 8 U.S.C. 1365. 96-1595 Pet. App. 33-34. With respect to petitioners' claims that they are entitled to funds that had not been specifically appropriated under Section 1365 to pay the costs of incarcerating illegal aliens, the court noted that the funds sought had been appropriated under lump-sum appropriations laws. The court therefore held that the decision regarding

allocation is committed to agency discretion and not subject to judicial review. *Id.* at 34-35.

3. The court of appeals affirmed in the California case, in a published opinion. Pet. App. 1-24. The court concluded that California's Invasion Clause claim is nonjusticiable. *Id.* at 11-13. The court explained that "[f]or this [c]ourt to determine that the United States has been 'invaded' when the political branches have made no such determination would disregard the constitutional duties that are the specific responsibility of other branches of government, and would result in the [c]ourt making an ineffective non-judicial policy decision." *Id.* at 12. The court also noted that "there are no manageable standards to ascertain whether or when an influx of illegal immigrants should be said to constitute an invasion." *Ibid.*

The court of appeals affirmed the dismissal of petitioners' Tenth Amendment claims on the merits. With respect to the Medicaid-based claims, the court concluded that, under settled law, the conditioning of Medicaid funds on California's agreement to provide medical care for needy illegal immigrants was not "coercion" of the State that could violate the Tenth Amendment. Pet. App. 15-17. Noting that "no party challenging the conditioning of federal funds has ever succeeded under the coercion theory," *id.* at 16, the court held that the present record failed to disclose the kind of "extraordinary" circumstances under which such coercion could be found. *Ibid.* With respect to the Tenth Amendment claims based on the costs of incarcerating illegal aliens, the court held that, "because no federal mandate requires California to pursue a penal policy resulting in" the State's incurring costs to incarcerate illegal aliens, petitioners

failed to allege a Tenth Amendment claim based on the fact that the State incurred those costs. *Id.* at 17.

With respect to petitioners' claim to reimbursement from lump-sum appropriations for expenses of incarcerating illegal aliens, the court agreed with the district court that "the Attorney General's decision to allocate monies generally appropriated to her in a lump-sum for the administration of the immigration laws for the specific purpose of reimbursing a State for the costs of incarcerating illegal aliens under 8 U.S.C. § 1365 is 'committed to agency discretion by law' and is not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2)." Pet. App. 19-20 (citing *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993)).

4. The court of appeals affirmed in the Arizona case in a brief order (96-1595 Pet. App. 1-2), "[f]or the reasons set forth in" the court's opinion in the California case. See also Pet. App. 7 n.1 (explaining that the substantive issues were addressed in the opinion in the California case because California presented claims in addition to those presented by Arizona).

ARGUMENT

The decision of the court of appeals is correct and is consistent with rulings of the Second, Third, Fifth and Eleventh Circuits, all of which have affirmed dismissal of similar claims. Further review is not warranted.

1. Petitioners contend (96-1596 Pet. 10-24; 96-1595 Pet. 16-18, 21-22) that by failing to halt the influx of illegal immigrants into California and Arizona, the federal government has breached its constitutional duty to "protect each [State] against Invasion." U.S. Const. Art. IV, § 4. As both district courts and the

court of appeals concluded, that claim presents a nonjusticiable political question. Pet. App. 11-13, 34-35.

The Constitution provides no "judicially discoverable and manageable standards for resolving" petitioners' claim. *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). In particular, the Constitution provides no criteria for determining when, if ever, a peacetime influx of migrants should be deemed to have risen to the level of an "invasion," or for assessing the adequacy of the federal government's response to such a threat. Adjudication of such a claim would require a court to "review the * * * entire enforcement of Federal immigration laws including the enforcement methods used and their effectiveness, determine the reasonableness of budget allocations, determine whether more resources are available and, if so, decide how those addition[al] resources should be allocated." *Chiles* v. *United States*, 874 F. Supp. 1334, 1344 (S.D. Fla. 1994), aff'd, 69 F.3d 1094 (11th Cir. 1995), cert. denied, 116 S. Ct. 1674 (1996). The Constitution provides no yardstick for determining when the federal government's indisputably massive expenditures on immigration control should be deemed a sufficient response under the Invasion Clause (even if we assume, *arguendo*, that the Clause applies in this setting), and it provides no means for determining what additional efforts should be compelled.

In addition, there is a "textually demonstrable constitutional commitment of the issue [of immigration and its control] to a coordinate political department." *Baker* v. *Carr*, 369 U.S. at 217. As this Court held in *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977), "'over no conceivable subject is the legislative power of Congress

more complete than it is over' the admission of aliens." See also *Mathews* v. *Diaz*, 426 U.S. 67, 81-86 (1976) (Constitution commits to the federal government the exclusive power to control immigration). Admission of aliens into the United States and control over the borders are matters firmly entrusted to the political branches. And protection of the United States from illegal immigration implicates matters of foreign policy and defense into which courts will intrude only with the greatest reluctance. See, *e.g.*, *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U.S. 298, 327-328, 330-331 (1994); *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993).

Finally, as the court of appeals recognized (Pet. App. 13), petitioners' claim misapprehends the intent of the Invasion Clause. The Constitution commits the national defense to the United States, and the Invasion Clause recognizes that it is the United States' role to protect against invasion. See also Art. I, § 8, Cl. 15 (listing among enumerated powers of Congress "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"). The conclusion that the Constitution refers to "invasion" in the sense of a hostile, presumably military invasion also is supported by its use in Art. I, § 9, Cl. 2, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[3]

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[3] That understanding of "invasion," as used in the Constitution, is fully consistent with 18th century usage. Dr. Johnson defined "invasion" as a "[h]ostile entrance upon the rights or possessions of another; hostile encroachment." 1 S. Johnson, *A*

2. a. The California petitioners contend (96-1596 Pet. 25-29) that their expenditures on emergency medical care for illegal aliens pursuant to the Medicaid program, coupled with the federal government's failure to halt all illegal immigration, contravenes the Tenth Amendment. The court of appeals correctly held that petitioners failed to state a claim under the Tenth Amendment.

Under this Court's Tenth Amendment jurisprudence, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York* v. *United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). See also *United States* v. *Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (*New York* v. *United States* involved "a formal command from the National Government directing the State to enact a certain policy"). Petitioners, however, identify no federal directive to the States regarding the treatment of illegal aliens, much less a directive that would commandeer the State's legislative or policy-making apparatus. The federal immigration policies at issue in this case do not require petitioners to enact or enforce a federal regulatory program.

The fact that the State may obtain federal Medicaid funds only subject to the condition that it provide emergency medical care under the Medicaid program to needy illegal aliens is not an unconstitutional

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Dictionary of the English Language (1755). Similarly, Dr. Johnson's primary definition of "invade" is "[t]o attack a country; to make an hostile entrance. He will *invade* them with troops." *Ibid.*

federal directive to the States that "commandeers" California's legislative or policy-making apparatus.[4] Medicaid is a voluntary federal spending program in which States may decline to participate. *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990); *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). In exercising its powers under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, Congress may "attach conditions on the receipt of federal funds." *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). Federal actions that "encourage" or "provide incentives" for States to adopt certain policies do not violate the Tenth Amendment. See *New York* v. *United States*, 505 U.S. at 174-176; see also *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 292 n.33 (even if the statute's "requirements will have a measurable impact on [the State's] economy, this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment"). Although those conditions "may influence a State's legislative choices," such influence does not violate the Tenth Amendment. *New York* v. *United States*, 505 U.S. at 167. See also *id.* at 171-173; *Oklahoma* v. *Civil Serv. Comm'n*, 330 U.S. 127, 142-44 (1947).

Petitioners argue (96-1596 Pet. 27) that, as a practical matter, California would not make the decision to

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[4] States choosing to participate in the Medicaid program are reimbursed with federal funds for a percentage of their costs in providing medical services to the needy. See 42 U.S.C. 1396. States are reimbursed for medical services provided to illegal aliens, but only for those services necessary to care for emergency conditions. 42 U.S.C. 1396b(v). Concomitantly, a State that wishes to receive Medicaid funds must provide emergency (but not non-emergency) medical services to illegal aliens. 42 C.F.R. 440.255(c).

forgo federal Medicaid funds and that the requirements of the Medicaid program thus constitute impermissible coercion. But "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Dole*, 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 589-590 (1937)). California has voluntarily elected to participate in the Medicaid program, presumably concluding that its benefits outweigh its costs. As the district court observed, petitioners' "acceptance of the Federal Government's $30 billion Medicaid grant is conditioned on California spending $1.7 billion for emergency Medicaid to illegal aliens." Pet. App. 38. California may not evade those costs by characterizing them as the product of unlawful coercion.

b. The Arizona petitioners contend (96-1595 Pet. 19, 20) that the federal government has "impermissibly shift[ed] the burden of implementing its immigration policy onto the State" by requiring the State, "at no economic or political cost to the federal government, [to] retain thousands of illegal inmates in its criminal justice system."

The court of appeals correctly held (Pet. App. 17) that petitioners failed to state a claim under the Tenth Amendment. The federal government has issued no directive to the States regarding the incarceration of illegal aliens, much less a directive that would commandeer the State's legislative or policymaking apparatus. The federal immigration policies at issue here are administered by federal agencies; their implementation does not require Arizona to enact or enforce a federal regulatory program.

As the court of appeals recognized, a State cannot properly premise a Tenth Amendment claim on its decision to expend resources to deal with problems

created by illegal aliens within the State's borders. The Tenth Amendment provides a shield against impermissible federal directives, not a sword to compel federal action. Concerns of the kind presented here by Arizona are dealt with through the political process. And, as noted below, see pp. 14-15 & n.5, *infra*, the political process has indeed resulted in a massive commitment of federal resources to the problem of illegal aliens incarcerated by the States for violations of state law.

3. Petitioners in the Arizona case argue (96-1595 Pet. 13-16) that they are entitled to a declaration that, in addition to any funds that Congress may specifically appropriate under 8 U.S.C. 1365 to reimburse the States for their costs of incarcerating illegal aliens, various lump-sum congressional appropriations are also available to provide funds for that purpose.

Under Section 1365, the Attorney General is authorized to reimburse the States for the costs of incarcerating illegal aliens convicted of state crimes. Section 1365, however, does not appropriate any funds, and it is expressly made "[s]ubject to the amounts provided in advance in appropriation Acts." 8 U.S.C. 1365(a). Congress enacted a specific appropriation of $130 million under Section 1365 for Fiscal Year 1995. Department of Justice and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, Tit. VIII, 108 Stat. 1778. See State Criminal Alien Assistance Program, 59 Fed. Reg. 50,830, 50,833 (1994). For Fiscal Year 1994, however, as for previous years, Congress appropriated no monies for distribution pursuant to 8 U.S.C. 1365.

Petitioners argue (96-1595 Pet. 13-16) that the Attorney General should have been required to dis-

tribute to the States, pursuant to 8 U.S.C. 1365(a), monies from the lump-sum appropriation made to the INS for salaries and expenses in fiscal year 1994. The court of appeals properly rejected that claim. By its terms, Section 1365(a) limits the Attorney General's authority to distribute monies to "amounts provided in advance in appropriation Acts." 8 U.S.C. 1365(a). Moreover, the court of appeals correctly reasoned that, even assuming that the Attorney General would have authority to make the distribution that petitioners sought, her decision not to use funds from lump-sum appropriations for purposes described in Section 1365(a) would be committed to agency discretion by law. 96-1595 Pet. App. 17. That conclusion is fully consistent with this Court's decision in *Lincoln* v. *Vigil*, 508 U.S. 182 (1993), in which the Court emphasized that the courts have "no leave to intrude" on an agency's allocation of a lump-sum appropriation, as long as the agency acts "to meet permissible statutory objectives." *Id.* at 193. The Attorney General's use of funds appropriated for INS salaries and expenses for the very purposes identified by Congress does not give rise to a reviewable claim.

Petitioners' contention is particularly anomalous in light of the fact that Congress has appropriated large sums in the years since this suit was filed for the specific purpose of helping States and localities deal with illegal aliens incarcerated for violations of state or local law. In the Violent Crime Control and Law Enforcement Act of 1994, Congress created a new statutory mechanism for that purpose and authorized amounts to be appropriated by Congress for Fiscal Year 1996 and following years. See Pub. L. No. 103-322, § 20301(a), 108 Stat. 1823-1824, adding 8 U.S.C. 1252(j). Congress appropriated a total of $500

million to fund Section 1252(j) in both Fiscal Year 1996 and Fiscal Year 1997.[5]

4. The ruling of the court of appeals is consistent with that of the four other courts of appeals that have addressed similar claims. See *Chiles* v. *United States*, 69 F.3d 1094 (11th Cir. 1995) (rejecting Invasion Clause and Tenth Amendment claims), cert. denied, 116 S. Ct. 1674 (1996); *Padavan* v. *United States*, 82 F.3d 23 (2d Cir. 1996) (same); *New Jersey* v. *United States*, 91 F.3d 463 (3d Cir. 1996) (same); *Texas* v. *United States*, 106 F.3d 661 (5th Cir. 1997) (rejecting Tenth Amendment claims). The Court denied review in the *Chiles* case last Term. There is no reason for a different disposition here, especially in light of the intervening decisions of other courts of appeals reaching the same result.

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[5] For Fiscal Year 1996, Congress appropriated $300 million for Section 1252(j). 142 Cong. Rec. H3846 (daily ed. Apr. 25, 1996). Congress also authorized an appropriation of an additional $200 million from the Violent Offender Incarceration and Truth-In-Sentencing Incentive Grants established by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 20102, 20103, 108 Stat. 1816-1817. 142 Cong. Rec. H3846 (daily ed. Apr. 25, 1996). For Fiscal Year 1997, Congress appropriated $330,000,000 "for the State Criminal Alien Assistance program, as authorized by section 242(j) of the Immigration and Nationality Act." Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 101(a), 110 Stat. 3009-14. In addition, Congress provided that "$170,000,000 shall be available for payments to States for incarceration of criminal aliens." *Ibid.*

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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